IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 104 OF 1989

Tanaji Baburao Phalke ...Appellant.

V/s

The State of Maharashtra ...Respondent.

Mr. Ram Makhija, advocate appointed for the appellant.
Mr. A.S. Shitole, APP for the State.

CORAM: V.M.KANADE,J.

DATE: 6th May, 2005

ORAL JUDGMENT:

1. Appellant is challenging the judgement and order passed by the 5th Additional Sessions Judge, Pune in Sessions Case No.79 of 1987. By the said judgement and order dated 30/9/1987, the trial court was pleased to convict the accused for an offence punishable under section 376 of the Indian Penal Code and sentenced him to suffer R.I. for seven years. The appellant - original accused has preferred this appeal against the said judgment and order.

2. Prosecution case in brief is that the accused was working as a peon in in Belheshwar Vidyamandir, Village Belhe, Taluka Junner, District Pune. The complainant Kesharbai, her minor daughter Kum Munni and her family consisting of her husband, four sons and five daughters were residing in two tents on the

rear side of the new school building which was situated on the outskirt of the village and the school building was under construction. Prosecution case is that on 18/6/1986, the complainant's younger daughter Munni who was a minor girl and was retarded since birth, was playing in the school compound. The complainant was in the tent and her daughter Lata returned to her tent after collecting the clothes. When they heard the cries of Munni, they rushed towards the school and found that the Munni was held by the accused and he was committing rape on her. The complainant tried to catch the accused. However, he managed to escape and started running towards the village. The complainant and her daughter chased the accused. The accused was apprehended and FIR was lodged. The prosecutrix was taken to the hospital where she was examined by the doctor. The accused was also examined by the Medical Officer who noticed that there were injuries on his penis. The charge-sheet was filed against the accused and the charge under section 376 of the Indian Penal Code was framed by the Sessions Court. The accused, however, pleaded not guilty to the charge. The trial court convicted the accused on the basis of the evidence adduced by the prosecution and sentenced him to suffer R.I. for five years.

3. I have heard Shri Ram Makhija, the learned counsel appearing on behalf of the accused and the learned APP appearing on behalf of the State. Shri Makhija, the learned counsel appearing on behalf of the appellant has taken me through the judgement and order of the trial court and also the evidence adduced by the prosecution. It is submitted that the prosecution story does not appear to be true and the entire circumstances on which the prosecution case is based appear to be false. It is submitted that the prosecution has failed to examine the prosecutrix and that was the major lacuna in the prosecution case. It is submitted that though the prosecutrix was retarded, she could have given evidence during the trial. It is submitted that the evidence of doctor who examined the accused was exaggerated. The learned counsel submitted that even though there are injuries on the genital of the accused, such type of injuries are possible in case of syphilis or any other venereal disease. He submitted that, therefore, the evidence of P.W. 10 - Dr. Deshpande could not be relied upon. It is submitted that the prosecution case that blood stains of the prosecutrix were found on the pants and underpants of the accused cannot be accepted since the prosecution witness P.W. 5 - Subhash Bhandari was a

professional panch and was under the permanent obligation of Police Department as he has owned hotel in the vicinity of the Police Station. It is further submitted that there is no direct evidence of the prosecutrix and the evidence was circumstantial.

4. It is not possible to accept the submissions made by the learned counsel appearing on behalf of the appellant. From the evidence of complainant P.W. 1 - Kesarbai, it can be seen that she has stated that the prosecutrix was her daughter and she was 10 years of age. She has further stated that on the date of the incident, she was in tent at 6 0'clock in the morning and her daughter had gone to collect the clothes kept for drying and that the prosecutrix followed her. Her daughter returned back to the tent after collecting the clothes. However, the prosecutrix stayed back in the school. After about 10 to 15 minutes, the complainant heard cries of her daughter Munni and, therefore, she and Lata went to the school. When they reached school, she saw the door of the room was closed. She pushed and opened the door and found that the accused was holding the prosecutrix Munni. She, therefore, caught hold of his hand. He, however, gave a jerk and ran away. She found that her daughter's clothes were stained with blood. She informed a

person who was residing in the neighbourhood of the school about the incident, who advised her not to run after the accused and she should narrate the incident to the teachers who come to the school. Thereafter, the accused was arrested. The complainant identified the accused in court. Her testimony has not been shaken in spite of gruelling cross-examination. The evidence of P.W. 1 has been corroborated by her daughter Lata - P.W. 2 who has stated that she had gone along with her mother after she heard cries of her sister Munni and she saw that the accused was committing rape on her sister Munni. Her examination-in-chief also has not been shaken in spite of being cross-examined at length. Prosecution has made an attempt to examine the prosecutrix. However, the court found that the prosecutrix was not in a position to understand the questions which were put to her and, therefore, did not permit the prosecution to examine her as a witness. The evidence of P.W.1 and P.W.2 is further corroborated by P.W.4 Balshiram Gunjal who has stated that on the date of the incident the complainant and her daughter Lata were chasing the accused and that the complainant had informed him that the accused had committed rape on her daughter. He has also stated that the complainant showed blood stained frock of her daughter. This evidence has been

corroborated by the medical evidence and also by the Chemical Analyser's report. P.W. 10 - Dr. Deshpande who examined the accused noticed that there were three injuries on the private part of the accused and he has stated that these injuries indicated that there was forcible attempt of sexual intercourse of a virgin minor girl. Prosecution also examined Dr. Subhash Saravade - P.W.11 who had examined the prosecutrix and he has stated that he has noticed that the hymen was ruptured and that in his opinion penetration is a cause of rupture of hymen. The C.A. report also indicated that the blood of the prosecutrix was found on the pants and underpants of the accused. Thus, in my view, prosecution has proved beyond the reasonable doubt that the accused had committed an offence under section 376 of the Indian Penal Code on a minor girl P.W. 3 - Munni.The finding of conviction by the trial court is, therefore, confirmed.

5. The learned Counsel appearing on behalf of the appellant submitted that the sentence of 7 years was harsh and the sentence may be reduced. He submitted that the appellant is the only earning member in the family and that this was an old case and the judgment was delivered by the trial court on 30/9/1987 and, thereafter, the appellant was released on bail. He

submitted that more than 15 years had passed after the said incident and the accused had not misbehaved or had committed any offence during this period. He, therefore, submitted that the sentence may be reduced on sympathetic ground.

6. It is no doubt true that more than 18 years have passed after the trial court convicted the accused and sentenced him to suffer R.I. for seven years and that he was released on bail by this Court. However, that does not mean that merely because there is a lapse of 18 years that the accused should go unpunished. The punishment, however, is reduced from 7 years to 5 years. Appeal is thus partly allowed. Conviction is confirmed. The sentence, however, is reduced from 7 years to 5 years. The accused, however, shall be entitled to get set off for the period of detention already undergone by him against the substantive sentenced awarded to him.

7. Appeal is disposed of in the above terms.

V.M. KANADE, J.